UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

EKHAYA YOUTH PROJECT, INC.	*	
Respondent	*	
	*	
and	*	
	*	Case No. 15-CA-155131
DALANA ZIPPORAH MINOR,	*	15-CA-162082
An Individual	*	
	*	
	*	

COUNSEL FOR THE GENERAL COUNSEL'S
BRIEF TO THE ADMINISTRATIVE LAW JUDGE
HONORABLE ARTHUR AMCHAN

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Amiel J. Provosty, Counsel for the General Counsel (Counsel) in the above case, submits this post-hearing brief to the Honorable Arthur Amchan, Administrative Law Judge.

I. STATEMENT OF THE CASE

A. Proceedings Before Hearing

On June 29, 2015, Zipporah Legarde, formerly known as Dalana Zipporah Minor (Minor), filed the original charge with Region 15 of the National Labor Relations Board (Board), alleging that Ekhaya Youth Project, Inc. (Respondent) engaged in unfair labor practices in violation of Section 8(a)(1) of the National Labor Relations Act (Act), by placing Minor on administrative leave and then discharging her from employment in retaliation for, and in order to discourage, protected concerted activities, in Case No. 15-CA-155131. GC-1(a).[1] Minor later amended the charge on August 27, 2015, (GC-1(c)), on September 11, 2015, (GC-1(e)), and on September 28, 2015, (GC-1(e)) to include additional Section 8(a)(1) violations for the Respondent's coercive statements, and coercive rules and policies. On October 16, 2015, Minor filed the original charge in Case No. 15-CA-162082 alleging that Respondent engaged in additional Section 8(a)(1) violations by its maintenance of an additional unlawful and coercive rule. GC-1(j). All

[1] Reference to the Exhibits of the General Counsel and Respondent will be designated as "GC-#" and "EYP-#," respectively, with the appropriate number or numbers for those exhibits. References to the transcript in this matter are designated as "Tr." Arabic numerals after "Tr." are a reference to a specific page of the transcript, and an Arabic numeral following a page citation and colon are references specific lines of the page cited as "Tr. #:#."

charges were served upon the Respondent. GC-1(b), (d), (f), (h), and j). On October 30, 2015, the Regional Director for Region 15 issued a Complaint and Notice of Hearing in 15-CA-155131 with a January 25, 2016 hearing date. GC-1(k). Respondent filed an answer. GC-1(m). On December 4, 2015, the Regional Director issued an order postponing the hearing. GC-1(n). On January 27, 2016, the Regional Director issued an Order Consolidating Cases, and Consolidated Complaint and Notice of Hearing in Cases 15-CA-155131 and 15-CA-162082 with a May 2, 2016 hearing date. GC-1(q). Respondent filed a second answer and incorporated by reference its prior answer. GC-1(s). On April 18, 2016, the Acting Regional Director issued an Amended Order Consolidating Cases, Consolidated Complaint and Notice of Hearing in Cases 15-CA-155131 and 15-CA-162082 (Amended CNOH). GC-1(t). On April 26, 2016, Respondent filed and served its Objections, Motion to Strike, and Answer (Answer) to the Amended CNOH, thereby incorporating by reference its prior two answers.[2] GC-1(x).

On May 2 and 3, 2016, Administrative Law Judge Arthur Amchan presided over the hearing in New Orleans, Louisiana.

B. Motion to Further Amend the Amended Complaint at Hearing

At hearing, Counsel moved the Honorable Judge Amchan to allow that the Amended CNOH be further amended to include Nicholas Davis (Davis) as an additional unlawfully discharged employee in violation of Section 8(a)(1) of the Act. The motion seeks to:

1. Amend paragraph 9(a) of the Amended CNOH to state as follows:

[2] Counsel refers to all three answers as "Answer" due to Respondent's incorporation of the first and second answers into its Answer dated April 26, 2016.

On multiple days during June 2015, more exact dates currently unknown to General Counsel, Respondent's Employees Dalana Zipporah Minor and Nicholas Davis engaged in concerted activities for the purposes of mutual aid and protection by (1) discussing Minor's salary with other employees; (2) discussing the work abilities of supervisors ; (3) discussing the work abilities of fellow employees; (4) discussing whether employees should receive promotions; (5) discussing the unfairness of the Continued Communication Policy ; and (6) discussing Respondent's mistreatment of fellow employees . Tr. at 6:19-7:18.

2. Amend paragraph 9(c) of the Amended CNOH to state that about June 22nd 2015 Respondent terminated Minor and Davis. Tr. at 7:19-20.

3. Amend paragraph 9(d) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraph 9(b) and 9(c) because Minor and Davis engaged in the conduct described above in paragraph 9(a), and to discourage employees from engaging in these or other concerted activities. Tr. at 7:21-25.

4. Amend paragraph 9(e) of the Amended CNOH to state that Respondent engaged in the conduct described above in paragraphs 9(b) and (c) because Minor and Davis violated the rules described above in paragraphs 5(a), 6, 7, and to discourage employees from engaging in these and other concerted activities. Tr. at 8:1-5

5. Amend the Remedy Section of the Amended CNOH to state as follows: (a) As part of the remedy for the unfair labor practice alleged

above in paragraphs (9b) and (c), the General Counsel seeks an order requiring the Respondents reimburse Minor and Davis for all search for work and work-related expenses regardless of whether Minor and/or Davis received interim earnings in excess of these expenses, or at all, during any given quarter, or during the overall back pay period. Tr. at 9:12-19.[3]

(b) In order to fully remedy the unfair labor practices and set forth above, the General Counsel seeks an order requiring that Minor and Davis be made whole including reasonable consequential damages incurred as a result of the Respondent's unlawful conduct. Tr. at 9:20-24.

II. STATEMENT OF THE FACTS

A. Background of Respondent

Respondent is a 501(c)(3) non-profit corporation and maintains multiple offices and places of business in Louisiana, including four places of business in New Orleans, Louisiana. GC-1(x), at 4-5; Tr. 44:23-45:23. At all relevant times, Respondent's administrative operations office was located at 2307 Bienville Avenue, in New Orleans (Bienville Office). Tr. 45:21-23. The Respondent is engaged in providing social services, mental health services, and substance abuse services in Louisiana. GC-1(x), at 4-5; Tr. 44:24-45-2. Respondent admitted by its Answer that it annually derived gross revenues in excess of $500,000, and also purchased and received at its New Orleans headquarters goods valued in excess of $5,000 from outside the State of Louisiana. GC-1(x), at 5.

[3] Counsel also moved to amend, in the alternative, Remedy paragraph (a) to reference Amended CNOH paragraphs to 9(b) and (c) regardless of whether Mr. Davis is added to the Amended CNOH as an unlawfully terminated employee. Tr. at 10:3-9.

B. Respondent's Unlawful Handbook Rules and Unlawful Corporate Compliance Program Rule

Chief Operating Officer VanShawn Branch (Branch), an agent and supervisor of Respondent under the Act, testified that Respondent's Handbook (Handbook) applies to all employees, supervisors, and managers across the State of Louisiana. GC-1(x) at 5; Tr. 44:6-22. The Handbook was published by Respondent for use by employees and management in about March 2015. Tr. 43:11-16. The Handbook was distributed by Branch to employees, including Davis and Minor, at a new employee orientation on or about May 18, 2015. Tr. 153:12-154:18, 260:2-8.

i. Overbroad Rule Restricting Boisterous or Disruptive Activity as Alleged in Amended CNOH Paragraph 7(a)

At pages 2-3 of the Handbook it states in part:

> Subject: Conduct and Work Rules
>
> To ensure orderly operations and provide the best possible work environment, Ekhaya Youth Project expects employees to follow rules of conduct that will protect the interests and safety of all employees and the organization. It is not possible to list all the forms of behavior that are considered unacceptable in the workplace. The following are some examples of infractions of rules of conduct which may result in disciplinary action, up to and including termination of employment: …
>
> 6. Boisterous or disruptive activity in the workplace. GC-2, at 2-3.

ii. Rules About Professional Ethics Which Restrict Protected Concerted Activities as Alleged in Amended CNOH Paragraph 7(b)

At pages 3-4 of the Handbook it states in part:

> Subject: Professional Ethics
>
> Ekhaya Youth Project staff shall maintain professional ethics and standards at all times and will adhere to the highest moral standards while on duty working. Recognize that the youth and families may have suffered

a dramatic emotional and/or physical trauma. Ekhaya Youth Project staff are their closest contact for emotional and physical support. Staff must meet their needs for attention and/or assistance without fail, if therapeutic goals are to be attained. . . .

8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). . . .

11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times. . . .

13. Staff will protect the privacy of other staff at all times.

14. Staff will not give information of any nature about other staff to any unauthorized individual. GC-2, at 3-4.

iii. Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment as Alleged in Amended CNOH Paragraph 7(c)

At page 4 of the Handbook it states in part:

Subject: Non-Disclosure

The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples: . . .

3. Financial information

4. Personnel information . . .

Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.GC-2, at 4.

Branch further stated that all payroll, aside from a minimum wage policy of $13.00 per hour, and all salary information was proprietary and confidential and the Respondent could not disclose it outside of the organization without the employee's permission, nor could any employee disclose it to any other employee within the organization. Tr. 85:1-19.

iv. Overbroad and Coercive Rule Regarding Employee Conduct That Causes Discredit to Respondent as Alleged in Amended CNOH Paragraph 7(d)

At pages18-19 of the Handbook it states in part:

> Subject: Disciplinary Action/Employee Performance Improvement Process: . . .
>
> B. Grounds for Discipline
>
> a. The following reasons constitute grounds for dismissal: . . .
> ix. The Employee has engaged in conduct, on or off duty that is of such a nature it causes discredit to the agency. GC-2, at 18-19.

v. Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment as Alleged in Amended CNOH Paragraph 7(e)

The Corporate Compliance Program (Compliance Policy) also applies to employees and managers. Tr. at 46:12-16. The Compliance Policy was provided to employees, including Davis and Minor, on or about May 18, 2015. Tr. 154:19-155:8, 260:2-8. At page 6 of the Compliance Policy it states in part:

> K. Personal and Confidential Information:
>
> Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families. GC-3, at 6.

C. Respondent's Initial Promulgation of Unlawful E-mail Monitoring Rules and Termination of Employees Davis and Minor

Discriminatee Davis was hired on about May 14, 2015, as Executive Assistant to Chief Executive Officer Darrin Harris. GC-10.1. His duties included scheduling for Harris, driving Harris around, and coordinating details on the Respondent's ongoing construction and installation at the Gretna, Louisiana location (the Playhouse). Tr. 259.

Discriminatee Minor was hired on about May 13, 2015, as a Central Office Administrator. Tr. 151:6-8, 152:16. Her duties included responding to correspondence, contacting outside vendors, and generally doing whatever Branch assigned to her. Tr. 152:16-25. Minor worked at the Bienville Office. Minor and Branch first met at Respondent's new employee orientation on or about May 18, 2015. Tr. 260:2-4.

The Bienville Office is a repurposed residence with two stories, and it housed a staff of about 15 people. Tr. 45:21-25, 65:10-68:10. Minor worked in the compliance office with three other employees (Yvette Frazier, Kenedra Graves and Stephanie McGrew) in close quarters in the front room of the second story. Tr. 156:14-24, 162:19-22. Branch admitted that from his first floor office in the Bienville Office he could hear conversation occurring all over, including conversations occurring upstairs on the second floor. Tr. 66:7-14. Supervisors Hannah McNally's and Vanessa Sumler's offices are on the second floor and in close proximity to the compliance office. Tr. 155:24-156:7.

On Friday, June 5, 2015, Minor rode in a car to the opening of the Playhouse. During the drive she commented to employee Frazier and to supervisor McNally that she was thankful for her new job and that Respondent was paying her $17.00 per hour, which came to about $35,000 in annual salary. Tr. 157:13-25. At this time, no other employees' salaries were discussed.

Meanwhile, Davis had been warned by Harris that socialization and being friendly with other employees was not acceptable because Davis might have to fire them one day. Tr. 277:24-278:3. Davis' job was to be with Harris, wherever Harris was, as an assistant. Tr. 269:13-16

About Monday, June 8, 2015, Davis was instructed to go to the Bienville Office to receive guidance from Minor on how to properly complete a log of work he performed the week before. Tr. 158:19-160:11, 261:1-12. Davis and Minor met in the computer lab located near the first floor kitchen and Branch's office. Tr. 160:9-15, 261:6-8. At that time, they discussed Harris' statement that Davis would be eligible for a raise after completing the 90-day probationary orientation and evaluation period. Tr. 159:9-16; *see also* GC-2, at 12. Minor stated that she was interested in a raise, that she had been researching what office administrators make, and would likely ask for a raise around December 2015. Tr. 159:13-21. According to Davis they also discussed Harris' plans to give raises to other employees. Tr. 263:14-20. They discussed that the fraternization policy was, in Davis' words, "kind of a joke," because Harris and Branch were in a romantic relationship and it was common knowledge among the employees, although Harris and Branch thought no employees knew about it. Tr. 261:25-262:5. They also discussed that the education levels of Respondent's employees varied, and that Minor and Davis felt that they were not properly compensated for their college experience compared to employees who had not completed any education beyond high school. Tr. 263: 21-25. They discussed how when work is forgotten by managers it ends up as a burden on the subordinate employees. Tr. 262:6-263:8. They discussed how they were scared about making mistakes in paperwork, and scared that other employees said employees were easily let go by Respondent. Tr. 262:20-8; 263:12-13. They discussed that working for Respondent was not what they had expected , that they felt they were "walking around on eggshells," and were "nervous about coming to work." Tr. 261:24, 263:3-11.

Later the week of June 8, 2015, Minor was involved in another discussion related to working conditions. Minor had not received a job description for her position until sometime during the week of June 8, 2015. Tr. 161:1-11. Minor was in the compliance office with Frazier, Graves, and McGrew. Tr. 161:13-165:22. Minor asked what Frazier did as a quality assurance employee. Tr. 161:13-16. Frazier, who was hired at the same time as Davis and Minor, stated that she still had not received a job description. Tr. 153:11-154:7. Minor stated that she had just received hers that day and shared it with the employees who were present. Tr. 161:13-20. As they discussed the duties assigned to Minor, Graves began to shout loudly and McGrew closed the door to the compliance office. Tr. 161:22-162:4, 163:17-20. They discussed that Minor was not actually a supervisor. Tr. 161:22-162:7, 163:22-164:4. McGrew and Graves opined that they thought Minor's actual job was to be a snitch for Branch because he was frequently out of the Bienville Office. Tr. 162:5-13. Minor stated that she was not there to step on toes but just to do the job that was assigned. Tr. 163:25-164:6. They discussed salaries and raises for employees, and Minor stated that she wanted to be eligible for a raise just like Davis. Tr. 164:15-25. Graves said that Respondent generously rewarded good work and described some of the raises she was entering into the payroll system for a few regional program managers. Tr. 165:1-9. During the discussion, supervisor Sumler opened the door to the compliance office and asked the employees why it was closed. Tr. 164:6-8. They said they were having a discussion and Sumler said that a closed door discussion was not allowed. Tr. 164:8-9. McGrew challenged Sumler and asked since when was closing the office door not allowed. Tr. 164:10. Sumler said they have never been allowed to close the office door and that they should not do it again. Tr. 164:11-12.

Minor had never heard any rule about employees not being permitted to close the office door before. Tr. 165:13-22.

Later in June 2015, COO Branch met with Minor. Tr. 84:4-86:8. Branch said he understood that Minor had been allegedly discussing the salaries of employees including her own. Tr. 59:11-61:14. During the conversation, Branch asked Minor if she had been talking with other staff about pay rates. Tr. 84:22-25. He discussed with Minor the importance of confidentiality, and told her not to disclose "any staff person's pay rate to any other staff person who is not privy to that information." Tr. 84:19-21.

Around the week of June 8, 2015, about two to three weeks after Davis was hired, he was told by human resources that his background check had resulted in discovery of a pending criminal felony charge. Tr. 264:14-24. Harris told Davis that he had lied on his application, but Davis corrected Harris and pointed out that the application had only asked if Davis had ever been convicted of a felony. Tr. 264:1-11, 264:24-265:3.[4] Davis explained to Harris that the pending matter was a marijuana-related charge, and that he was not convicted but could not go into details about the open case. Tr. 264:9-11, 265:4-7, 298:18-299:3 Davis was asked to provide more information to Branch regarding the criminal proceedings. Tr. 100:10-12, 265:18-266:1.

Respondent, by Branch, admitted that only a conviction for murder, manslaughter, molestation, or malpractice would rule out an employee from being hired by Respondent. Tr. 359:1-8.

[4] The Handbook states, "The employee must disclose convictions on their application." GC-2, at 13.

On June 14, 2015, Davis travelled with Harris to North Louisiana to observe Respondent's Shreveport facility and attend an opening at its Monroe facility. Tr. 266:5-13. On June 15, 2015, Davis wrote an email to Branch and Harris and stated, "I contacted my lawyer for the appropriate paper as requested for from [sic] Mr. Branch. The paralegal that sends those letters will do so tomorrow and I will scan a copy of the July 27th court date." GC-17; Tr. 265:15-266:4.

By email on June 18, 2015, Davis' attorney sent a letter to Harris stating, at 8:02 a.m. from Davis' lawyer's office to Harris with a 'cc' to Davis stating:

> Mr. Harris, Please be advised that Mr. Davis has not been convicted on this matter and I do not believe this should affect his employment with your company in any way.
>
> If you should have any questions, or need additional information, please feel free to contact my office. GC -18.

Davis understood this would satisfy Respondent's request for more information. Tr. 266:21-267:4. Harris and Branch reviewed the letter prior to Davis' termination, and Respondent did not request further information from Davis. Tr. 102:10-103:1; Tr. 267:7-10.

On June 18, 2015, when Minor arrived at work around 9:00 a.m., she read an email from COO Branch addressed to her and the three other women who worked in the compliance office. Tr. 165:25. Branch wrote:

> Please do not close the door to the Corporate Compliance Office. No meetings should be held in the Corporate Compliance Office without prior authorization from your immediate Supervisor. Any meeting held by Ekhaya Youth Project should have a sign-in sheet and meeting minutes.this [sic] Office door [sic] should never be close by any of the individuals seated in the Corporate Compliance Office or any other office unless the Manager of the Department orders a meeting. GC-4

Compliance Officer Nora Rowan testified she did not know there was a rule at the Bienville Office that employees could not have a meeting without prior permission from a manager prior to the email sent by Branch. Tr. 343:13-344:22. Also on the morning of June 18, 2015, Minor read another email from Branch which was addressed to all the Bienville Office employees stating:

> Any emails forwarded and replied to by any Central Office Staff member must be carbon copied to the COO. Please be sure to follow the policy and procedure listed in this email. This policy is effective Thursday, June 18, 2015.
>
> In the event the email did not include the COO, please be sure to include the COO when replying. Responsiveness is required during the hours of 9am - 6pm and the promise to communicate will be exemplified via operation of the policy stated in this email. GC-6; Tr. 166:8-11.
>
> If you have any inquiries regarding the content of this email, please do not hesitate. GC 6; Tr. 166:8-11.

Both policies promulgated by email on June 18, 2015 were newly established work rules. Tr. 166:12-18.

Later on June 18, 2015, Minor and Davis exchanged a series of text messages on their personal mobile phones. Davis was in Monroe with Harris at the time. Tr. 266:5-13, 273:1-6. At 12:24 p.m. Minor sent a text to Davis asking if he knew what was going on "down here," to which he replied by text that he heard "they had an argument." GC-10.5. Minor understood that Davis was referring to an argument between McGrew and Sumler about Frazier forging a record regarding when she took her lunch break. Tr. 167:21-168:2, 274:19-21. Minor then texted Davis at 12:33 p.m. that there was going to be a surprise staff meeting on Monday and, "I think Mr. Branch hates Yvette [Frazier]. I've been told my position is redundant by staff [because] they don't need (want) [to be]

supervised." GC-10.5.[5] At 12:35 p.m., Minor sent a text message to Davis stating she just wanted to "order supplies, make the office look cool, have everything run like a proper business." GC-10.6. At 12:38 p.m., Davis texted Minor asking why Branch hated Frazier, and asked Minor to have Frazier text him. GC-10.6.[6] At 12:39 p.m., Minor wrote, "No idea. I don't know anything except I just need everyone [to] chill and get along." GC-10.7. At 12:40, Davis responded, "They check emails so I don't want to give her my number or talk via email with [you] all." GC-10.7.[7] Then at 12:42 p.m., Minor wrote, "Omgg despite the fact they can check emails, they have implemented this new policy where we have to CC Mr. Branch on EVERYTHING." GC-10.8.[8] Davis then stated by text:

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[5] Minor believed Branch disliked employee Frazier because Frazier had complained to Minor that a rule requiring employees to be back from lunch by 2:00 p.m. was dumb. Tr. 168:13-169:3. Frazier and Minor discussed that Minor would ask Branch in her next meeting with him why there was such a rule and why Frazier could not take her lunch hour whenever she wanted because Frazier wanted to be able to go home to let her dog out when taking lunch later in the day. Tr. 168:23-169:3. Minor met with Branch, and asked about the rule; he asked who brought it up. Tr. 169:4-6. Minor stated that it had been Frazier. Tr. 169:6-7. Branch said to Minor that he did not understand why Frazier was inquiring about rules and that if she did not like it, then that was her personal problem. Tr. 169:7-9.

[6] Davis asked about Frazier because he wanted to understand the issue going on in the office, and understand why Branch did not like Frazier. Tr. 268:3-8. Davis was concerned because Branch had influence over Harris and terminating, which could affect Frazier's job security. Tr. 268:5-12.

[7] Minor understood this reference to checking emails by Davis to refer to Respondent's right to check employees' Respondent-provided email accounts. Tr. 169:20-170:5. Davis also understood that employees should watch what they placed in emails because management could read them at any time. He specifically did not want to inquire about Branch disliking Frazier in email for fear of losing his job. Tr. 270:22-271:10.

[8] Minor was referring to the new email policy that Branch had announced that morning. Tr. 170:6-12; *see* GC-6.

> I really don't like him, he doesn't know his job forgets to do stuff assigned to him then wants to walk around like he's big shit. He attempts to [belittle] people who don't have a degree an [sic] he doesn't even have one. I believe he doesn't like Yvette [Frazier because] she's pretty, intelligent, and a woman everything he wants to be."

GC-10.8-9.[9] At 12:49 p.m., Minor responded by text,

> I dunno. Sometimes he bugs me but he's not going anywhere given the circumstances. I think Yvette challenging him is a poor career move if she wants [to] keep working with them. But I really want [to] stay out of it but I think I'm trapped [in] it so oh well.

GC10.9. Davis responded at 1:02 p.m. by texting, "To challenge a supervisor when they are wrong is not wrong, he just feels because of his title he is entitled to be automatically right." GC-10.11.[10] Then at 1:05 p.m. Minor compared challenging Branch to trying to make recommendations to a Disney movie villain, as she wrote, "Yeah, but you gotta [be] way sneaky about it. It's like a got damn Disney villain scenario. 'Sire perhaps we could try capturing Aladdin by…' 'Cease your chatter, fool!'" GC-10.11. The message exchange ended at 1:09 p.m., when Davis wrote, "I see what your [sic] saying."

[9] Davis believed that Branch did not like anyone who challenged his authority or position. Tr. 268:15-17. Davis criticized Branch about forgetting stuff because Davis recalled that a fire marshal inspection necessary for opening the Playhouse had not been properly done by Branch so it was reassigned to Davis and Branch's assistant Marte Robinson. Tr. 260:13-15, 262:9-25, 271:6-11. Davis criticized Branch for belittling employees because he believed Branch worked when he wanted and pressured employees to bend to his will under threat of termination, while he was unlikely to be fired due to his role in management and his relationship with Harris. Tr. 270:19-271:5. He thought Branch did not like Frazier specifically because, one, some men have issues with women correcting them, two, she was intelligent and had a college degree while Branch came from working in retail, and three, she exhibited femininity and Branch and Harris were in a relationship. Tr. 269:1-9.

[10] Davis believed that Branch's attitude about always being correct affected employees because if an employee is correcting a mistake or oversight, Branch acted as if the employee was trying to undermine him and there would be a problem. Tr. 272:9-19.

Davis thought that he was communicating privately to Minor with the messages. Tr. 272:6-8. Minor did not know how Branch learned about the messages between her and Davis prior to her termination. Tr. 176:9-177:11. Minor did leave her phone unattended in the compliance office when she left to go to the restroom. Tr. 171:5-9.[11]

At Respondent's Bienville Office employees have an hour for lunch, and one 15 minute break. Tr. 171:21-172:2. All the Bienville Office employees, except in the billing office, are free to take their 15 minute break at any time. Tr. 171:2-6.

After the text messages between Davis and Minor, Minor went on her lunch break. Tr. 171:2-11. About 15-30 minutes later she decided to take her 15 minute break. Tr. 171:13-20. Minor set her phone timer for 15 minutes and put her head down on her desk. Tr. 171:17-18. About seven minutes into her break she heard someone walk in and heard a shutter snap from a mobile phone camera. Tr. 172:20-24. Minor lifted her head and saw Sumler, who stepped back "a little bit startled." Tr. 172:24-173:2. Sumler said that she came in to see why no one was answering the phone. Tr. 173:3-4. Minor said that she heard it ring but it was the main phone line and not her work extension. Tr. 173:6-13. Sumler said that someone needed to answer the main phone. Tr. 172:16-17. Minor stated that she was on her 15 minute break. Tr. 173:17-18. Sumler stated that it was Minor's responsibility to answer the main phone, but Minor disagreed and said that it was Marte Robertson's job. Tr. 173:23-174:6.[12] Sumler stated that the phone had been ringing and ringing, and that Minor needed to answer it. Tr. 174:1-2, 8-13. Minor again stated that

[11] Minor sent a text message to Davis after he was fired stating, "They ambushed me [in] the office & asked me about the texts. I never left my phone open, so I think someone got [yours]."

[12] Robertson worked downstairs on the first floor of the Bienville Office. Tr. 174:3-6.

she was on break and therefore was busy. Tr. 174:14. Sumler stated, "Well, we're all busy," and stormed out of the office. Tr. 174:15-20. Prior to June 18, 2015, no one had ever told Minor that she could not place her head on her desk during her 15 minute break. Tr. 176:3-5. Sumler did not state that the conversation between her and Minor should be considered a verbal warning to Minor not to put her head on her desk or sleep at her desk. Tr. 175:15-21. No one had ever instructed Minor to work during her 15 minute break prior to June 18, 2015. Tr. 175:22-176:2.

At 3:09 p.m., less than a half hour after the discussion between Minor and Sumler, Branch sent an email to Minor, with a 'cc' to Harris, Rowan and Sumler, stating in part,

> Zipporah,
>
> Please create an incoming call log. In addition, if you are not aware allow this email to be your notification that currently it is your responsibility to answer all incoming calls and document them via the log you will create. In the event you step away from your desk, please have Marte answer the phone.
>
> Once you develop the log, please forward it to me for approval. GC-5; Tr. 174:23-175:4.

Prior to June 18, 2015, answering the main phone at the Bienville Office was not in Minor's job description and no one had ever told her she needed to answer the main phone or make a call log. Tr. 175:5-14.[13]

On June 18, 2018, Branch was out of the office, at training in Houma, Louisiana. Tr. 83:13-19. According to Rowan, Branch left the Houma training meeting quickly. Tr. 128:11-23. Branch testified that he left in the middle of the training. Tr. 369:8-14.

[13] The Handbook states in part that a job description will "specify the actual duties and responsibilities of the positions." GC-2, at 18.

According to Rowan, Branch did not attend the last portion of the training with the upper management team in Houma. Tr. 129:1-7.

According to COO Branch, employee Graves called him and told him that Davis and Minor were gossiping about him. Tr. 86:9-18. According to Branch, he then received a call from Sumler stating that Minor was caught sleeping but Sumler had corrected the issue. Tr. 86:19-87:24.

Later that day Branch arrived at the Bienville Office and asked Minor to meet him in his office. Tr. 176:9-12. When Minor arrived, Sumler was present and Branch was on the phone with someone who Minor believed to be Harris. Tr. 176:13-18. Branch asked Minor to tell him about the conversation between her and Davis. Tr. 176:19-21. Initially, Minor did not know what Branch was asking about, but after Branch elaborated she realized Branch knew about the text messages. Tr. 176:21-25. Branch asked Minor what Davis had texted about Branch and Branch's performance. Tr. 177:4-5. Minor admitted there had been a text message conversation about Branch in which Davis made some disparaging remarks. Tr. 177:5-11. Branch asked to see Minor's personal mobile phone and the text messages. Tr. 177:12-13, 178:1-4. Minor said she was not comfortable allowing Branch to have her personal property, and asked if she was in trouble. Tr. 177:15-23. Branch became visibly upset, and said he did not trust Minor. Tr. 177:16-18. Branch would not say whether Minor was in trouble or not, so Minor refused to show the text messages without a guarantee that she was not in trouble. Tr. 178: 6-11. Branch accused Minor of just wanting to cover her own ass. Tr. 178:12. Minor responded, "Yes," because she had not done anything wrong. Tr. 178:12-13. Branch reminded Minor that he was not quick to trust people, and that he found Minor untrustworthy. Tr. 178:15-19.

Branch admits that Minor did not want to show him the messages. Tr. 88:13-89:2. Sumler also admits Minor did not want to disclose the text messages. Tr. 249:8-10. Branch then asked about Minor and Davis hanging out outside of work, and Minor denied ever doing so. Tr. 178:23-25. Branch asked about an employee outing, and Minor corrected Branch by stating that Davis was not at that social gathering of employees outside of work. Tr. 178:25-179:10. Branch asked Minor if she felt that hanging out outside of work with other employees was behavior befitting an office administrator. Tr. 179:11-13. Minor said she did not see a problem with it. Tr. 179:13-15. Branch said it was unacceptable for Minor to hang out with other employees outside of work. Tr. 179:16. Branch turned to Sumler, and asked her how they could be sure that Minor did not talk to the other employees about private or confidential information like salaries or other proprietary information. Tr. 179:16-20. Several times Branch told Sumler that Minor had access to "it all" and "everything." Tr. 179:20-25. Sumler was shaking her head in agreement and stated that Minor had access to confidential information. Tr. 180:1-5. Sumler admitted that she believed that Minor was discussing employees' salaries with other employees. Tr. 248:11-25.

Minor told Branch and Sumler that the only salary she had ever discussed was her own, and that she was comfortable doing so because it was not confidential to her, and it was not a measure of her work as a person. Tr. 180:8-13. Branch said Minor did not have a right to discuss that information and that it did not "appease" him or give any "credibility" to whether or not Minor discussed anyone else's salaries. Tr. 180:14-17. Minor finally showed Branch all the text messages between her and Davis in the hope

that when he saw them he would recognize that she had not said anything negative about him. Tr. 182:10-19. Branch requested screen shots but Minor refused. Tr. 182:21-23.

At that point, Minor told Branch that she was homosexual, and did not agree with the message about Branch wanting to be pretty, intelligent, and a woman like Frazier, because it indicated a misunderstanding about the difference between sexual orientation and gender. Tr. 182:23-183:5. Branch again asked for screen shots of the text messages between employees, and Minor again refused to make screen shots. Tr. 181:20-182:1, 183:20-21. Branch asked her to write a statement stating that she had received text messages from Davis about Branch's job performance. Tr. 181:20-182:1, 183:20-21. Minor agreed to write the statement as a compromise, and Branch walked away while talking on his phone to an unknown person. Tr. 183:21-13. After about five minutes Branch returned, and asked Sumler to bring him Minor's personnel file. Tr. 184:5-10.

After Sumler returned with the file, Branch looked through it and asked, "Did we ever put a note in your file about how you did not have a completed bachelor's degree?" Tr. 184:10-14. Minor said she did not remember. Tr. 184:16. Branch stated, as he continued reviewing the file, in a quiet voice that he "did not see that in here." Tr. 184:16-18.

Because a degree was not required for Minor to work in her position, she believed that Branch was looking for a reason to fire her. Tr. 184:19-185:8. Minor then said Branch did not have to go through a song and dance about trying to find something in her file, and if he did not want her to be at his organization anymore, he could just say so. Tr. 185:11-14. Branch slammed Minor's file closed, told her she had an attitude, directed her to go upstairs to pack her desk, and leave before he called the police. Tr. 185:14-17.

Branch and Sumler escorted Minor upstairs and she packed her desk in front of everyone in the compliance office. Tr. 185:18-20. Later as Minor stood outside trying to load her things onto the bike she rode to work, she said to Branch that she liked working for the Respondent, knew he was upset and knew he said he did not trust her. Tr. 185:20-186:11. Minor stated that she wanted him to believe that she was trustworthy, and she then captured screenshots of the text messages and sent them to Branch. Tr. 186:10-14.

The night of June 18, 2015, Davis was at Wal-Mart with Harris in Monroe, Louisiana. Tr. 273:5-20. Davis overheard Harris on the phone with Branch asking what was going on, and talking about "mess" at the organization. Tr. 273:10-12. Harris then turned to Davis and said, "Mr. Davis, you better not be involved or you are going to be fired too." Tr. 273:12-14. Davis was told there would be an employee meeting the following Monday. Tr. 273:14-15.

On June 18, 2015, at 8:23 p.m., Branch sent Minor a series of texts informing her that she was temporarily on administrative leave pending further investigation. GC-8; Tr. 97:17-98:3, 186:18-187:2. At 8:24 p.m., Branch stated in a text message, "Please do not have any conversations with staff or it could possibly effect [sic] the outcome of the investigation." GC-8.

Davis reported to the Bienville Office on Monday, June 22, 2015, for the special employee meeting. Tr. 274:6-12. All employees from the New Orleans area facilities were present. Tr. 275:1-5. Harris led the meeting and talked about "mess" growing in his organization. Tr. 274:22-24, 275:6-11. Harris said he needed to cut out the cancer and if anything was being said about him, his personal life, or the Respondent, that he had a lawyer and would sue employees for slander. Tr. 275:10-16. Harris said he gave everyone

an opportunity, but still he had this cancerous gossip going around his organization and he was going to solve it that day. Tr. 275:17-21.

Frazier, Robertson, Sumler, McGrew, and Davis were told to go to the back room of the Bienville Office while Harris dealt with another matter. Tr. 275:22-276:12. Harris then terminated McGrew and cited the yelling that occurred between McGrew and Sumler about Frazier that was mentioned by Davis and Minor in their text messages. Tr. 276:15-20; GC-10.5; GC-24. Davis was then called up to the front of the first floor, and Harris questioned Davis on how "this cancer would start from somebody so close to him," of all people, after Harris and Davis were together all week. Tr. 277: 4-9.

Later that day, Davis sent a text message to Minor at 10:41 a.m. stating, "According to Mr. Harris some text messages were read an[d] I was fired and he referred to messages that I only sent to you." GC-21.

On June 19, 2015, Minor sent an email to Branch regarding her employment status, sexuality, and the office culture. Tr. 201:2-9.

On about June 22, 2015, Respondent mailed to Davis and Minor letters of termination and Discipline Documentation Notices. Tr. 49:5-7, 50:1, 50:9-15, 187:11-14, 278:12-280:17, 282:2-25; GC-9; GC-10.2-4, 10.12.

The letter sent by Respondent to Davis stated in part:

> We regret to inform you that your employment . . . shall be terminated effective immediately.
>
> A formal grievance was filed and an investigation was conducted. After review of our findings, we determined you were in violation of the following policies:
>
> - EYP Employee Handbook, Conduct and Work Rules, 8. Insubordination or other disrespectful conduct.

- EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct.
- EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function).
- EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.
- EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.
- EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.
- EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal, ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.
- Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families.

> Ekhaya Youth Project, Inc. will have to terminate your employment based upon these policy violations. If you have questions or concerns in regards to our findings, please feel free to contact the Human Resources Department. If you would like to appeal this matter, call 855-FSO-4YOU to file a grievance. GC-10.2

Respondent's letter to Minor was substantively identical to the letter sent to Davis, except there was no mention of Handbook rule 8. GC-9.

The Discipline Documentation Notice that Respondent sent to Davis stated that Respondent was terminating him for a third offense. GC-10.3. Respondent described only two incidents on the document:

> Incidient [sic] 1: After receiving Mr. Davis' completed background check, it was determined that he had pending charges on his record. Mr. Davis was advised by the CEO, Darrin Harris, to produce a personal explanation and accompanying court documents to maintain compliance with OBH/CSoC requirements. He did not produce these documents, disobeying a direct request from his Supervisor.

> Incident 2: It was brought to the attention of the UMT that Mr. Davis had engaged in several inappropriate conversations with fellow employees, particularly Ms. Zipporah Minor, Central Office Administrator. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal likes/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered inappropriate familiarity among staff members and is strictly prohibited. Mr. Davis was also specifically advised not to cultivate friendships with other employees to maintain the strictest standards of privacy and confidentiality of the CEO, which he deliberately disobeyed. GC-10.3

Respondent's Discipline Documentation Notice further explained to Davis the policy violations associated with his termination were as follows:

> 1.) EYP Employee Handbook, Conduct and Work Rules, 8. Insubordination or other disrespectful conduct. Violation of the policy when Mr. Davis disregarded the direct order from his supervisor to produce an explanation of a pending charge and accompanying court documents. Additionally, he developed an inappropriate relationship with Ms. Zipporah Minor when he was advised not to cultivate friendships with Ekhaya employees to maintain a professional standard of privacy and confidentiality necessary to his position as Executive Assistant to the CEO.
>
> 2.) EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct. Violation of policy demonstrated when Mr. Davis did not produce the required personal explanation and court documentation of pending charges to maintain compliance with OBH/CSoC policy.
>
> 3.) EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). Violation of policy demonstrated through a relationship developed with Ms. Zipporah Minor that cultivated gossip, sharing of confidential information, and contributed to discomfort and distrust within the work environment.
>
> Violation of the following policies were demonstrated when Mr. Davis contributed to conversations in person and via text discrediting the

> professional abilities and salaries of fellow employees and/or Supervisors and, additionally, gossiped about their personal lives.
>
> 4.) EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.
>
> 5.) EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.
>
> 6.) EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.
>
> 7.) EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal. ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.
>
> 8.) Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families. GC-10.4.

The Discipline Documentation Notice that Respondent sent to Minor stated that Respondent was terminating her for a third offense. GC-9.1. Respondent described the three incidents as follows:

> Incidient [sic] 1: Ms. Minor was witnessed sleeping at her desk by multiple employees.
>
> Incident 2: Ms. Minor was regularly engaged in loud non-work related conversation. She was verbally warned and advised to stop participating in such conversation by her Supervisor VanShawn Branch. The behavior did not cease as advised.
>
> Incident 3: It was brought to the attention of the Supervisor, Mr. Branch, that Ms. Minor had engaged in several inappropriate conversations with fellow employees, particularly Mr. Nicholas Davis, Executive Assistant to the CEO. These conversations were proven to include gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries, and personal lives, including but not limited to a belief of undeserved promotions, accusations of mistreatment of an employee based on personal likes/dislikes, and assumptions about sexual orientation and inter office relationships. Multiple texts regarding these topics were

> continually exchanged between Mr. Davis and Ms. Minor leading to what would be considered inappropriate familiarity among staff members and is strictly prohibited. GC-9.1

Respondent's Discipline Documentation Notice further explained to Minor the policy violations associated with her termination were as follows:

> 1.) EYP Employee Handbook, Conduct and Work Rules, 18. Unsatisfactory performance or conduct. Violation of policy demonstrated when Ms. Minor was asleep at her desk as witnessed by coworkers and also participated in an abundance of loud non-work related conversation disrupting the office environment and limiting the work completed.
>
> 2.) EYP Employee Handbook, Professional Ethics, 8. Inappropriate familiarity among staff members (will not occur in the facility or during any program function). Violation of policy demonstrated through a relationship developed with Mr. Nicholas Davis that cultivated gossip, sharing of confidential information, and contributed to discomfort and distrust within the work environment.
>
> Violation of the following policies were demonstrated when Ms. Minor contributed to conversations in person and via text discrediting the professional abilities and salaries of fellow employees and/or Supervisors and, additionally, gossiped about their personal lives.
>
> 3.) EYP Employee Handbook, Professional Ethics, 11. Staff will strive to work together as a cohesive team, supporting one another and administration at all times.
>
> 4.) EYP Employee Handbook, Professional Ethics, 13. Staff will protect the privacy of other staff at all times.
>
> 5.) EYP Employee Handbook, Professional Ethics, 14. Staff will not give information of any nature about other staff to any unauthorized individual.
>
> 6.) EYP Employee Handbook, Disciplinary Action/Employee Performance Improvement Process, Grounds for Dismissal. ix. The employee has engaged in conduct, on or off duty, that is of such a nature that it causes discredit to the agency.
>
> 7.) Corporate Compliance Program, K. Personal and Confidential Information, Ekhaya Youth Project will protect personal and confidential information concerning the organization's system, employees, and youth and families. GC-9.1-2.

D. Respondent's Lack of Documentation, Lack of Progressive Discipline, and Lack of Investigation of Davis and Minor

Branch oversaw the process of terminating Davis and Minor. Tr. 47:21-25. Branch was formerly the Corporate Compliance Officer, and has no authority to deviate from the Handbook. Tr. 48:21-23, 63:24-64:8. Supervisor Rowan was the Corporate Compliance Officer at the time of the discharges. Tr. 105:1. The job of the Corporate Compliance Officer is to ensure employees and supervisors follow Respondent's policies and procedures, including the Handbook. Tr. 105:4-18. The Handbook sets out a progressive discipline policy:

> Ekhaya Youth Project has authority to take disciplinary action against any employee. . . . A process of progressive discipline is followed to ensure that employees are afforded adequate opportunity to correct unacceptable behavior. However, the seriousness of the offense may dictate overriding progressive discipline, and serious offenses may lead to immediate dismissal at any stage of the process. GC-2, at 18.

Respondent states in the Handbook:

> In cases where performance becomes an issue and a youth is not put at risk, Ekhaya Youth Project will follow a plan for progressive discipline that shall be as follows:
>
> 1. Verbal Warning
> 2. Written Warning
> 3. Final Written Warning
> 4. 3 working day suspension, without pay, from the floor. The employee may not return to work until he/she has a conference with the Administrator.
> 5. Termination.

GC-2, at 13-14.

Employees have a right prior to discharge to documentation "of all disciplinary actions," and "the consequences of continuation or recurrence" of the behavior. GC-2, at 21. An employee may be placed on administrative leave, for example, if their presence at

the work site would hinder review or investigation, there is a situation perceived to be "urgent or serious" such as when the employee's presence would be "detrimental to the public interest or the continued efficient operation," or for "other extraordinary circumstances." GC-2, at 20. Additionally, "Employees have the right to dispute or give a written rebuttal regarding any disciplinary action." GC-2, at 20. Respondent also maintains a dispute resolution policy[14] through its payroll provider Canal HR, which provides, "You may submit a complaint to the [Dispute Resolution Officer of Canal HR] about any matter that has affected or may affect [sic] you on the job." Tr. 126:20-25; GC-11, at ¶3. Rowan admitted it was in Respondent's best interest to keep good records of discipline and performance problems. Tr. 125:20-23. Rowan also testified that if an employee had a "conduct" violation it would be documented. Tr. 123:17-18.

Rowan testified that parts of the Handbook are "contradictory," and that Respondent could deviate from progressive discipline depending on circumstances, which neither Rowan nor any agent of Respondent defined at the hearing or by any terms in the Handbook.[15] Tr. 112:22-113:6. Rowan stated that Respondent can place an

[14] Minor signed and agreed to the Dispute Resolution Policy as a condition of her employment. GC-11, at 2.

[15] After the termination of Davis and Minor, Respondent applied progressive discipline to employee Jasmon Martin on the recommendation of Harris. Specifically, on July 13, 2015, Martin was given a first warning after the employee failed to report to work in violation of four Handbook policies. Tr. 113:11-115:13; GC-23. Martin was placed on a "30 day probationary period." GC-23. Also on July 13, 2015, Respondent used progressive discipline with employee LaShonda Jackson on the recommendation of Branch. Jackson was issued a first warning after she failed to complete assigned work tasks on multiple occasions. Tr. 78:14-79-5; GC-22. The Discipline Documentation Notice issued to Jackson cited both Handbook rule 8, "Insubordination or other disrespectful conduct," and rule 18, "Unsatisfactory performance or conduct." GC-22.

employee on a performance improvement plan when "their supervisor thought that their performance needed to change." Tr. 122:15-19.

Rowan testified that the policy which applied to the investigation of Minor could be found in the Corporate Compliance Manual. Tr. 105:19-106:3. However, she also testified that Respondent did "not quite" follow the investigatory procedures. Tr. 106:11-13. Rowan finally admitted that Respondent did not apply any formal investigation process or procedure before recommending Minor's termination, but instead she tried to find out if Minor "violated any policies and procedures" to cite in a disciplinary action. Tr. 106:8-108:18, 131:8-12, 140:14-141:10; GC-3, at 10.

Rowan admitted she was initially told by Branch, as she drove to New Orleans from Houma, that he placed Minor on administrative leave, and he did not tell her what policies Minor had violated or potentially violated. Tr. 129:11-130:1.

On Friday, June 19, 2015, Rowan started her investigation of Minor at about 5:00 p.m. Tr. 130:20-25. Rowan testified that she was unfamiliar with and did not possess the text messages that Minor gave to Branch, did not know what Minor was accused of, and was looking for any violations of policies and procedures she could use in an investigation of Minor. Tr. 131:5-12, 329:19-331:1. Rowan testified that during her investigation, Frazier reported Minor had discussed salaries with other employees, and Frazier reported that Minor had at some time reviewed some kind of payroll document and that Minor expressed that she thought she should be paid more. Tr. 131:13-132:2, 138:16-22. Rowan testified that Branch told her during her investigation that Minor had been speaking about employee salaries. Tr. 132:22-24.

Respondent characterized Minor's June 19, 2015 email to branch as a "formal grievance,"[16] but Rowan did not contact Minor, the grievant, at any time during the investigation of the purported grievance. Tr. 130:2-10, 208:6-11; GC-9; EYP-4.

Rowan claimed that she, the former Office Manager, who had been in her new job as Corporate Compliance Officer for only 22 calendar days, recommended to Harris that Minor be terminated. Tr. 108:19-109:1, 112:3-4; 144:21-145:5. She testified she made her recommendation to terminate after creating a first version of Respondent's Internal Investigation Report, but that first version was not saved or retained by Respondent. Tr. 141:23-145:21. Rowan admitted that she altered her report after Minor filed her Board charge resulting in a second version of the Internal Investigation Report. Tr. 141:23-145:21; GC-15.

Respondent admits did not consider a performance improvement plan for Minor. Tr. 145:22-146:10. Although, Rowan had recommended a performance improvement plan for McGrew, an employee she supervised directly and who was also terminated on June 22, 2015.[17] Tr. 147:19-21, 149:3-13. Rowan also testified that she did not

[16] The Respondent received an email from Minor on June 19, 2015. EYP-4. In the email Minor advocated for regular meetings so that employees could express concerns about their working conditions, successes, and frustrations to management. EYP-4, at ¶13. She wrote about her experience as a "queer woman" about needing an organizational culture that allowed for expression of sexual orientation. EYP-4, at ¶¶5-7. She also stated that Graves and McGrew expressed negative attitudes to her about Branch's sexual orientation and that she overheard other conversations in the workplace expressing negative attitudes about homosexuality. Id. at ¶¶9, 11.

[17] Respondent terminated McGrew for, in part:

> Incidient [sic] 1: Ms. McGrew was unknowingly overheard by her Supervisor, Mr. VanShawn Branch, discussing what she considered shortcomings in his professional ability and as a Supervisor, in addition to gossip regarding his personal life.

investigate Davis in any way, and was not aware of why he was terminated. Tr. 146:21-147:1. However, the second, and allegedly only remaining version of the Internal Investigation Report that Rowan created directly references "the Executive Assistant to the CEO," which was Davis' position before his termination. GC-15.1.

E. Respondent Reiterates and Alters Unlawful Email Policy

On August 11, 2015, at 12:35 p.m., Branch sent an email to employees stating,

> This email serves as a reminder. Please do not violate this policy. Any violations to any policy will be addressed by a Discipline Documentation Notice and followed by a Performance Improvement Plan. Please note our organizations policies are not personal. Find no offense in the reminder or the policy designed to protect you and assist you with compliance. Again, I repeat please follow this policy.

GC-7. In the typescript below the above paragraph in the 12:35 p.m. email Branch restated in whole the rule originally promulgated on June 18, 2015, at 3:33 a.m. GC-6, GC-7.

Also on August 11, 2015, at 12:40 p.m., Branch sent a second email instructing employees, "Please be sure to respond to this email stating you have read, understand and will comply with the policy written in this email. Thanks for your cooperation." GC-7.

> Incident 2: Ms. McGrew initiated an unauthorized private meeting in the Corporate Compliance Office, violating the Open Door policy at Ekhaya. When asked about the content of the meeting, she could not produce meeting minutes. As an employee in a supervisory roll [sic], she was aware of this breach of policy when calling the meeting.
>
> Incident 3: Ms. McGrew consistently participated in loud non-work related conversation. She was verbally warned by Supervisors not to engage in such conversation, but continually violated their requests resulting in a disruptive work environment and spotty work performance. GC-24.

The email repeated and forwarded Branch's email from five minutes earlier. Id. At 1:55 p.m., Supervisor McNally replied to Branch's email with a 'cc' to employees including Frazier, Graves, and Robertson. The subject of McNally's reply email was, "Re: Email (cc) Policy (Requirement for All Central Office Staff)," and stated, "Good afternoon, I have received, read, and understand this email. Thank you." GC-7. McNally's reply email included in whole the email from Branch sent at 12:40 p.m. GC-7.

On December 18, 2015, Branch sent an email to all Bienville Office staff reiterating and altering the previously promulgated 'cc policy.' Tr. 96:13-18. The subject of the phone was, "Continued Communication Policy" and "CC Policy," and it stated the following:

> The performance of your duties as an EYP Corporate Office employee which is conducted by e-mail must be conducted using EYP's e-mail system (ekhayafso.org and/or your ekhaya gmail account [first initial, last name eyp@gmail.com]) and not your personal e-mail. All e-mail which is sent by you and/or which is replied to or forwarded by you using EYP's e-mail system must be copied to the COO; in the event that an original email is received by you on EYP's e-mail system and the COO is not copied, you must forward a copy of that e-mail to the COO and copy the COO with any response on EYP's e-mail system. Responsiveness is required during office hours of 9:00 a.m. – 6:00 p.m. and the promise to communicate will be exemplified via operation of the policy stated in this email. The policy outlined in this email ensures 'continued communication' throughout the daily operations of the organization. For Ekhaya Youth Project, this policy is named the Continued Communication Policy and carbon copied or cc is the alternate descriptive. This policy is effective the date of this email. GC-16.

III. CREDIBILITY RESOLUTIONS

A. Respondent's Pretextual Documentation and Investigation of Davis and Minor Is Entirely Discredited by Supervisor Nora Rowan's Testimony

Supervisor Rowan provided contradictory and implausible testimony, and falsified Respondent's documentation regarding Minor's activities. Counsel submits that Rowan was a misleading, untruthful, and unreliable witness.

Rowan admitted that she was told to conduct an investigation involving Minor as she drove back from Houma, Louisiana on June 18, 2015, and admitted she did not know what she was investigating. Tr. 131:5-12, 333:5-11. Her entire investigation started at 5:00 pm on Friday, June 19, 2015, and concluded on Sunday, June 21, 2015. 139:14-140:13. Moreover, she initially testified that she followed an investigative process that she followed an investigative process, but then under further questioning was forced to completely back off that testimony. Tr. 106:8-108:18, 131:8-12, 140:14-141:10.

Rowan also admitted she did not have the text messages involving Minor's conduct in her possession during her investigation, and did not exhibit any familiarity with their contents while conducting the investigation. Tr. 329:19-331:1. She testified that Branch only showed the texts to her from his phone at some unrecalled time on June 19, 2015, but then she admitted that she did not remember anything about seeing the text messages. Tr. 332:18-333:1. Rowan also admitted she did not have the texts in front of her when she wrote the first version (the missing version) of the Internal Investigation Report dated June 21, 2015, recommending that Minor be terminated. Tr. 333:18-21; GC-15. Rowan obviously did not make any effort to ascertain whether Respondent's progressive discipline policy should be followed when recommending termination for Minor.

Rowan testified that she was aware of Minor's Board charge within a week from the date it was filed,[18] and at Branch's request the purported original and missing Internal Investigation Report was altered resulting in a second Internal Investigation Report being completed at some time around July 6, 2015. 139:17-140:1, 141:23-142:24, 144:1-14; GC-15. Notably, all of the supporting statements to the investigation are dated July 5, or 6, 2015. GC-12; GC-13; GC-14. The first Internal Investigation Report and any supporting documents existing prior to the termination of Minor, if they ever existed, were not retained by Respondent despite the filing of a Board charge. Tr. 145:17-21.

The purported second Internal Investigation Report retained by Respondent, and the Disciplinary Documentation Notice issued to Minor stated that multiple employees saw Minor asleep at her desk. GC-9; GC-15.1. Rowan was not credible on this point of the investigation either. Rowan testified at the hearing that Frazier reported to her that Frazier saw Minor asleep in the compliance office and testified to the same in an affidavit under oath. Tr. 116:14-18, 326:17-24. Rowan testified inconsistently later during the hearing that Frazier only told her that the sleeping happened, and admitted that she did not know if Frazier saw Minor asleep. Tr. 132:3-11. Then conveniently on redirect, Rowan's memory suspiciously crystalized and she testified that she had no doubt that Frazier told her that Frazier saw Minor asleep. Tr. 348:5-10. Unfortunately for Rowan's credibility, Frazier testified in complete contradiction, stating that she did not see Minor with her head on her desk and did not report anything about Minor sleeping. Tr. 255:1-17.

[18] Charge 15-CA-155131 was filed on June 29, 2015, and served on Respondent on June 30, 2015. GC-1(a, b).

Furthermore, Rowan testified that no one told her that Minor claimed to be on break when she rested at her desk. Tr. 116:23-117:5, 117:20-23. Rowan admitted that employees, "can do whatever they wish to on their break." Tr. 118:8-10.

Rowan also testified that she spoke to Sumler in the course of her investigation. Tr. 116:20-22. However Sumler testified in complete contradiction by stating that no one ever contacted her after June 18, 2015, regarding whether Minor violated any policies or had been asleep at her desk. Tr. 252:14-21, 53:19-24. Therefore it actually makes sense that Rowan did not know Minor was on break when she laid her head on her desk.

Counsel respectfully asserts that Rowan lied about talking to Sumler, Rowan lied about the substance of what Frazier told her, and Rowan either lied when she said there was an initial investigation documenting the basis of Minor's termination before Minor filed her Board charge or Respondent willfully deleted documentation. Regardless, Respondent's failure to follow its progressive discipline policy, or investigatory protocol, and the Respondent's inexplicable refusal to contact Minor, even though according to Respondent a formal grievance was initiated, tends to suggest that if in the unlikely event there was any investigation prior to the Board charge, it was done only to justify Branch's angry determination that the discussion about the working conditions evident in the text messages between Davis and Minor would not be tolerated.

B. Respondent's Witnesses COO VanShawn Branch was Evasive, Untruthful, and Unreliable

COO Branch provided this court with implausible and inconsistent testimony about Respondent's reasons for terminating Davis and Minor, and therefore his testimony should be discredited.

Branch is the reason Rowan conducted the thoroughly discredited investigation. Branch testified that Frazier witnessed Minor sleeping at her desk, and that Frazier "had attested to witnessing it on several occasions," however Frazier denies ever seeing Minor asleep at work. Tr. 50:25-51:8, 254:21-255:17, 367:1-9. Branch stated that Minor received several verbal warnings for loud, non-work related conversation. Tr. 51:17-25. However, Branch, the Chief Operating Officer and former Corporate Compliance Officer,[19] did not create or have anyone else create any records of these putative verbal warnings for Minor's personnel file, even though is very aware that it is Respondent's policy that all discipline must be recorded and that employees have the right to know the consequence of repeated problems as explicitly required by the Handbook. Tr. 51:17-52:11; GC-2, at 21.

Branch testified there were no other reasons for Minor's termination except for the reasons provided in the June 22, 2015 termination letter and the associated disciplinary documentation. GC-9-9.2; Tr. 50:9-24. However, during Respondent's case in chief Branch added additional pretextual justifications contradicting his earlier testimony. He testified that on the very morning that he implemented the Continued Communication Policy he noticed Minor not completing tasks as instructed. Tr. 369:18-25. Branch would have Your Honor believe that the day that he found out Minor was not properly conducting work tasks and Minor was sleeping at work, it was such a serious problem that he was forced to leave a training in Houma before meeting with Respondent's upper management. Apparently due to the 'seriousness' of Minor's poor

[19] Rowan admitted that the Corporate Compliance Officer is responsible for ensuring that employees and supervisors follow policies and procedures, including the Handbook, Corporate Compliance Manual, and disciplinary investigations. Tr. 105:4-106:10.

performance and conduct, Branch could not correct the issue by email or rely on Sumler to take care of the problem, yet Minor's alleged poor performance was never documented before June 18, 2015, nor were the shortcomings mentioned in the Discipline Documentation Notice that listed Respondent's reasons for terminating Minor. Tr. 129:1-7, 369:10-17, 370:9-21.

Moreover, Branch testified that he relied on an email from Graves in determining there was offensive talk about him by Minor. However, Respondent did not call Graves, a current employee and Branch's own cousin, to testify. Tr. 372:9-24.

Branch also amazingly testified to additional justifications for Minor's termination which were outside the scope of the termination paperwork would be protected concerted activity. Branch admitted that he told Minor prior to June 18, 2015, that other employees were concerned about her having access to salary information, and that he later learned Minor subsequently asked other employees about their concerns even though he told her not to discuss the "coaching" he gave her. Branch admitted he told Minor, not to tell the staff person "that I informed you of this information that they brought to me," because it would "cause dissention with the staff." Tr. 379:11-380:7. Whether this is an admission of animus toward Minor's protected concerted activity of discussing her counseling with other employees, or a complete fabrication, it is at least clear that Branch's shifting justifications completely undermine his credibility.

During the Respondent's case, Branch also claimed that the basis for Davis' termination was not all included in his termination documentation. GC-10.3-4. Initially Branch testified Davis did not discuss other employees' salaries, but shortly thereafter he testified that Davis stated publicly in the workplace that another employee "did not

deserve to be paid her wage," and somehow Davis, "knew what she made." Tr. 363:22-364:2. Predictably there is no documentation of this incident during which Davis allegedly also insulted the other employee. Tr. 363:8-13. Your Honor specifically asked Branch if there was anything else considered beyond the scope of the documentation in the decision to terminate Davis, and Branch evaded the question by stating that "there were several other incidents," but, "I will leave it at that, sir, if you don't mind." Tr. 363:2-5. There is nothing credible about Branch's account of events, shifting reasons for the terminations, and his generally vague and sometimes evasive testimony.

IV. ARGUMENT

A. Amended CNOH Paragraphs 5(a) and (b) - Branch Unlawfully Coerced Employees by Telling Minor by Text Message that She was Prohibited from Speaking to Other Employees and That If She Did Speak To Other Employees It Would Affect Her Employment.

On June 18, 2015, Branch called Minor to a meeting with Sumler present for the purpose of interrogating her about her protected concerted activity in the form of text messages with Davis. The test for determining whether an interrogation violates Section 8(a)(1) is whether, under the circumstances, the interrogation reasonably tended to restrain or interfere with the employees' exercise of the rights guaranteed them under the Act. *Spartan Plastics*, 269 NLRB 546 (1984). The totality of circumstances includes the nature of information sought, the place of interrogation, the method of interrogation, and who engaged in the interrogation. *Sunnyvale Medical Clinic*, 277 NLRB 1217, 1217-18 (1985) (discussing *Rossmore House*, 269 NLRB 1176 (1984)). Branch gave the unmistakable impression that the private text messaging between Minor and Davis was unacceptable when he accused her of wanting to cover her own ass by not showing the text messages to him. Tr. 178:6-13. Branch interrogated Minor and intimidated her until

he gained access to the text messages, even stating that Minor should not be hanging out with other employees on her own time.[20] Tr. 179:16-20. Under the circumstances, this was coercive interrogation that an employee would understand was meant to stifle protected concerted activities.

After Branch told Minor not to socialize with other employees outside of work, Branch told Minor that he thought Minor was discussing salaries and other confidential information. Tr. 179-80. After viewing the text messages and instructing Minor to clean out her desk and to leave the office, Branch sent Minor text messages instructing her that she was on administrative leave, and also stating, "Please do not have any conversations with staff or it could possibly effect [sic] the outcome of the investigation." GC-8.

In *The Boeing Company* the Board discussed when an employer may require confidentiality during a disciplinary investigation. 362 NLRB No. 195 (Aug. 27, 2015).

> While an employer may legitimately require confidentiality in appropriate circumstances, it must also attempt to minimize the impact of such a policy on protected activity. Thus, an employer may prohibit employee discussion of an investigation only when its need for confidentiality with respect to that specific investigation outweighs employees' Section 7 rights. *Id.* at *1.

Here, Respondent's offered no explanation for the need for confidentiality. The policy was aimed squarely and only at Minor and was implemented with coercive intent.

Respondent's text message to Minor is also a coercive threat of adverse employment action by stating that any further conversations with other employees, a

[20] Although not alleged as a separate violation, Branch's statement to Minor was in violation of the Act. *See Tarlton and Son, Inc.*, 363 NLRB No. 175, at *2 (Apr. 29, 2016), (discussing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004)).

reference to her recent protected concerted activities, and to further protected concerted activity, could alter (and not for the better) the outcome of the disciplinary process.

B. Amended CNOH Paragraphs 5(c-h) - Branch unlawfully suppressed employees' Section 7 rights by informing Davis and Minor that they were terminated for a litany of protected concerted activities.

It is undisputed that on June 22, 2015, Respondent issued the termination letters and Discipline Documentation Notices to Davis and Minor. GC-9; GC-10.2-4.

On about June 22, 2015, Respondent informed Davis and Minor that they were terminated for "several inappropriate conversations with fellow employees" that included "gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities, salaries," "belief of undeserved promotions," and "accusations of mistreatment of an employee." GC-9.1; GC-10.3. Also Respondent informed Davis and Minor, "Multiple texts regarding these topics were continually exchanged," between the two employees, "leading to what would be considered inappropriate familiarity among staff members and is strictly prohibited." GC-9.1; GC-10.3.

The termination documents are replete with violative coercive statements, and motive is not relevant. "The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group,* 339 NLRB 303 (2003). In addition, "in considering whether communications from an employer to its employees violate the Act, the Board applies the objective standard of whether the remark tends to interfere with the free exercise of employee rights. The Board does not consider either the motivation behind the remark or its actual effect." *Scripps Memorial Hospital Encinitas,* 347 NLRB 52, 52 (2006). This analysis follows below.

i. <u>5(c) Discussing salaries with other employees</u>

Respondent unlawfully indicated to Davis and Minor that they should not talk about employee wages by issuing the termination documentation. GC-9.1; GC-10.3. The reasonable interpretation of the statement that employees should not talk about wages is unlawful under the *Scripps Memorial Hospital Encinitas* test, 347 NLRB at 52.

ii. 5(d) Discussing the work abilities of supervisors with other employees

Respondent unlawfully indicated that employees engaged in "gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities" giving the unmistakable sense to Davis and Minor that they should not talk about the professional abilities of supervisors. GC-9.1; GC-10.3.

The reasonable interpretation of the statement under the *Scripps Memorial Hospital Encinitas* test is that Branch did not want employees to discuss his professional abilities or the abilities of any other supervisors. 347 NLRB at 52. The statement is objectively coercive because it prohibits protected concerted activities that address concerns about a supervisor's inadequate supervisory skills. *See Senior Citizens Coordinating Council*, 330 NLRB 1100, 1104 (2000) (concerted complaints about supervisor skills are protected by the Act).

iii. 5(e) Discussing the work abilities of fellow employees with other employees

Respondent unlawfully directed Davis and Minor not to talk about the professional abilities of their coworkers at all, by stating in writing that they engaged in "several inappropriate conversations with fellow employees" that included "gossip and misinformation regarding Ekhaya employees/Supervisors professional abilities. GC-9; GC-10.3.

The statement announced by Respondent is reasonably read to encompass discussion of coworkers working conditions, job performance, any discipline, and their qualifications or abilities. The overbroad prohibition encompasses a wide potential range of protected concerted activities. Therefore it is objectively coercive under the *Scripps Memorial Hospital Encinitas* test. 347 NLRB at 52.

iv. 5(f) Discussing whether employees should receive promotions with other employees

Respondent unlawfully told Davis and Minor that employees engaged in "several inappropriate conversations with fellow employees" that included "belief of undeserved promotions." GC 9.1 GC-10.3. Minor and Davis would have understood this to mean a prohibition on criticizing the promotion of Branch by Harris. Davis testified that employees thought Respondent's anti-fraternization policy was "kind of a joke," due to Branch's and Harris' relationship. Tr. 261:25-262:5. Furthermore, Branch admitted the termination documentation mentioned employees' "belief of undeserved promotions" because he was sensitive about his own promotion and Rowan's promotion. Tr. 63:3-23, 64:23-65:9. This is an implicit admission by Branch that he believed some employees felt that favoritism was involved in his own promotion or that Rowan and he were unqualified. Rowan had recently been an office manager until June 1, 2015, when she became compliance officer. Tr. 108:24-109:1. Respondent's statement prohibits employees from criticizing Respondent's promotions policies, and is therefore objectively coercive because it implicates rights protected by Section 7 of the Act. *See id.*

v. 5(g) Discussing the Unfairness of the Continued Communication Policy

Respondent stated in the Discipline Documentation Notices that Davis and Minor engaged in "inappropriate conversations" and that "multiple texts" exhibited "inappropriate familiarity," and is, "strictly prohibited." GC. 9.1, 10.3. These broad statements, while potentially applying to a wide range of protected activity, were made in direct reference to the text messages wherein Minor complained about the new June 18, 2015, "Continued Communication" policy. GC 6; GC-9.1; GC-10.3-8.

Respondent's statement about inappropriate familiarity applied to all Minor and Davis' protected activities, and it signaled that discussing all working conditions, and including Respondent's Continued Communication Policy as seen in Minor and Davis' text messages was "strictly prohibited." GC-6; GC- 9.1; GC-10.3-8. Respondent's use of such overbroad language, would cause its employees to understand that they should not discuss or communicate about any workplace complaint or concern. Any employees in the position of Minor and Davis would reasonably understand that they were not to discuss any topics found in Minor and Davis' text messages, and a wide range of other activity protected by Section 7. GC-10.3-8 The strict prohibition would certainly chill complaints regarding the brand new workplace policy wherein a supervisor told them to 'cc' him on every single email sent through the work email system. GC-6. The statement objectively coercive because it implicates rights protected by Section 7 of the Act. *See id.*

vi. 5(h) Discussing Respondent's mistreatment of fellow employees with other employees

Davis and Minor discussed Branch's treatment of employees and Branch's management style, and specifically discussed their perceptions about how Branch treated Frazier and how Frazier might challenge Branch's ego or management style. GC-10.8-9, 11. This prohibition in the termination paperwork is objectively coercive and discourages

employees' right to act for mutual aid or protection as either a rule or a simple coercive statement. The Board has consistently held that it is unlawful for an Employer to inform an employee that they are being discharged because of their protected concerted activities. *See Three D, LLC d/b/a Triple Play Sports Bar and Grille*, 361 NLRB No. 31 (2014); *Extreme Building Services Corp.*, 349 NLRB 914 (2007).

C. Amended CNOH Paragraph 6 - Since at least June 18, 2015, but reaching as far back at Section 10(b) permits, Respondent has maintained a rule prohibiting employees from discussing their salaries.

At some time in June 2015 a more, Branch met with Minor, and asked her if she had been speaking to staff about pay rates. Branch also told her not to disclose "any staff person's pay rate to any other staff person who is not privy to that information." Tr. 84:19-25. Then on June 18, 2015, during the interrogation of Minor about her text message conversation with Davis and, Branch asked Minor how they could know that Minor did not talk to other employees about salaries. Tr. 179:20-25. Minor very clearly told Branch she only told other employees about her own pay. Tr. 180:8-13. Branch indicated that she did not have a right to discuss employees' salaries with other employees and that he thought that she had done so. Tr. 180:14-17. "The test of whether a statement is unlawful is whether the words could reasonably be construed as coercive, whether or not that is the only reasonable construction." *Double D Construction Group*, 339 NLRB 303 (2003). In this case, the statement tends to interfere with free exercise of employee rights because the statement would objectively bar employees from discussing their wages.

The statement also reinforces the Handbook and Corporate Compliance Manual Rules barring discussion of employee salaries further discussed below at sections D(ii, iii, and v).

D. Amended CNOH Paragraph 7 – Respondent's Unlawful Handbook Provisions

In determining whether a work rule violates the Act, the Board considers whether the rule would reasonably tend to chill employees in the exercise of their statutory rights. *Guardsmark, LLC v. NLRB*, 475 F.3d 369, 374 (D.C. Cir. 2007), (discussing *Lutheran Heritage Village-Livonia*, 343 NLRB 646 (2004). The Board engages in a two-step inquiry that first focuses on whether the rule restricts Section 7 activity on its face. Id. If the rule does not violate the Act on its face, the Board considers whether one of the following three conditions exists: (1) employees would reasonably construe the language to prohibit Section 7 activity; (2) the rule was promulgated in response to union activity; or (3) the rule has been applied to restrict the exercise of Section 7 rights. Id. Rules which are ambiguous as to their application to Section 7 activity and contain no limiting language or context that would clarify to employees that the rule does not restrict Section 7 rights are unlawful. *See University Medical Center*, 335 NLRB 1318, 1320–22 (2001).

i. 7(a) Rule Restricting Boisterous or Disruptive Activity

At pages 2-3 of the Handbook, Respondent maintains a rule that "Boisterous or disruptive activity in the workplace" may result in disciplinary action. GC-2, at 2-3. The use of "boisterous" as a descriptor of prohibited conduct is overly broad and vague and is reasonably read to restrict activity protected by Section 7. The use of "disruptive" is excessively vague, because Respondent's Handbook fails to give any context about what conduct the Respondent seeks to curtail. Therefore this rule fails the first prong of the

Lutheran Heritage Village-Livonia, because it is reasonably read to restrict protected activity. 343 NLRB at 646-647*; See Sisters Food* Group, 357 NLRB No. 168 (2011) (holding that a rule requiring employees to work harmoniously with other employees is unlawfully imprecise and overbroad).

ii. 7(b) Rules About Professional Ethics Which Restrict Protected Concerted Activities

At pages 3-4 of the Handbook, Respondent states as an ethical rule that "Inappropriate familiarity among staff members (will not occur in the facility or during any program function)." GC-2, at 3-4. This rule is overbroad on its face and potentially encompasses Section 7 activities. *See Guardsmark, LLC v. NLRB*, 475 F.3d at 373 (holding employer's overbroad fraternization prohibition could be interpreted by employees to bar them from discussing terms and conditions of employment). The rule was also cited in the unlawful termination documents that Respondent issued to both Davis and Minor, and it was applied to restrict their protected concerted activities, thereby failing the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; GC-9; GC-10.

At pages 3-4 of the Handbook, Respondent states as an ethical rule that "Staff will strive to work together as a cohesive team, supporting one another and administration at all times." GC-2, at 3-4. This rule is ambiguous on its face. It could encompass any disagreement between employees and management, including activities protected by Section 7. *See Sisters Food* Group, 357 NLRB No. 168 (2011). The rule was also cited in the unlawful termination documents that Respondent issued to both Davis and Minor, and it was applied to restrict their protected concerted activities, thereby failing the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; *GC*-9; GC-10.

At pages 3-4 of the Handbook, Respondent states as an ethical rule that "Staff will protect the privacy of other staff at all times." GC-2, at 3-4. Also at pages 3-4 of the Handbook, Respondent states a second ethical rule that "Staff will not give information of any nature about other staff to any unauthorized individual." GC-2, at 3-4. Both of these provisions are vague and overbroad. They can each reasonably read as specifically barring employees from revealing or discussing information about other employees, which could logically include grievances, wages, hours, discipline and other terms and conditions of employment. Both provisions are facially unlawful. *See Flamingo Hilton-Laughlin*, 330 NLRB 287, fn.3 (1999) (holding that rule prohibiting employees from revealing confidential information about customers, hotel business, or fellow employees violated Section 8(a)(1)). Also, both rules were cited in the unlawful termination documents that Respondent issued to Davis and Minor, therefore the rules were applied to restrict the employees' protected concerted activities. Therefore both rules fail the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; *see also Automatic Screw Products Co.*, 306 NLRB 1072 (1992) (holding employer violated Section 8(a)(1) by promulgating and maintaining rule prohibiting employees from discussing their salaries and also by disciplining an employee for violating the rule); GC-9; GC-10.

iii. 7(c) Rule About Non-Disclosure Which Further Restricts Employees Right to Discuss Terms and Conditions of Employment

At page 4 of the Handbook, Respondent states as a "Non-Disclosure" rule, that

> The protection of confidential business information and trade secrets is vital to the interests and the success of Ekhaya Youth Project such confidential information includes, but is not limited to, the following examples: . . .
> 3. Financial information
> 4. Personnel information . . .

> Employees who improperly use or disclose trade secrets or confidential business information will be subject to disciplinary action, up to and including termination of employment and legal action, even if they do not actually benefit from the disclosed information.GC-2, at 4.

Respondent's non-disclosures rule should be reasonably read to prohibit employees from speaking about their salaries, grievances, hours, and any other terms and conditions of employment, and is therefore unlawfully overbroad. *See Flamingo Hilton-Laughlin*, 330 NLRB 287 (1999).

iv. 7(d) Overbroad and Coercive Rule Regarding Employee Conduct That Causes Discredit to Respondent

At pages18-19 of the Handbook it states in part:

> Subject: Disciplinary Action/Employee Performance Improvement Process: . . .
> B. Grounds for Discipline
> a. The following reasons constitute grounds for dismissal: . . .
> ix. The Employee has engaged in conduct, on or off duty that is of such a nature it causes discredit to the agency. GC-2, at 18-19.

This rule is unlawfully vague and unlawfully overbroad. It encompasses unspecified conduct in the workplace and outside of the workplace. It has no limiting principle whatsoever on its face. It is reasonably read to prohibit and apply to any action by an employee based only on a subjective determination by Respondent's management, and therefore must be interpreted to prohibit Section 7 activity. This rule is distinguishable from a permissible rule because Respondent has not tried to describe how exactly an employee might complain about Respondent in a fashion that does not chill Section 7 activities. Additionally, the rule was also cited in the termination documents that Respondent issued to Davis and Minor, therefore it was applied to restrict their protected concerted activities and fails the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; GC-9; GC-10.

v. 7(e) Compliance Policy Rule That Further Restricts Employees Right to Discuss Terms and Conditions of Employment

At page 6 of the Compliance Policy at a section named "Personal and Confidential Information," Respondent states employees, "Will protect personal and confidential information concerning the organization's system, employees, and youth and families." GC-3, at 6. The rule is impermissibly overbroad and vague, and is reasonably read to unlawfully prohibit employees' right to discuss their terms and conditions of employment. Additionally, the rule was cited in the termination documents that Respondent issued to Davis and Minor, therefore it was applied to restrict their protected concerted activities and fails the third prong of the *Lutheran Heritage Village-Livonia* test. *Supra*; GC-9, 10.

E. Amended CNOH Paragraphs 8(a, b) – Continued Communication Policy

After Branch learned that employees, including Minor, had met in the compliance office behind a closed door, he sent out two emails on June 18, 2015. GC-4; GC-6. The discussion was loud, and the employees discussed a lack of clarity in job descriptions, and employee compensation. Tr. 153:11-154:7, 161:13-20 161:22-162:7; Tr. 163:17-20, 163:22-164:4, 164:6-12, 164:15-165:9. The first email from Branch stated that closed-door meetings were not permitted without permission of an immediate supervisor. GC-4. The second email stated a new policy as of that date, requiring that all emails sent by Bienville Staff had to include Branch as an additional recipient (Continuing Communication Policy). GC-6.

The Continuing Communication Policy was intended to chill employees in exercise of Section 7 rights, under the analysis of *Lutheran Heritage Village-Livonia*. *Supra*. The policy was enacted in order to surveil and discourage concerted complaints of

employees about working conditions, after the growing concern of Branch that the four employees in the corporate compliance office were engaging in the protected concerted activities of discussing salaries. The record is full of Branch and Sumler's animus toward employees discussing salary information. GC-9; GC-10. Branch and Sumler knew the four employees discussed financial terms of employment because sound carried at the small Bienville Office. Tr. 45:21-25, 65:10-68:10, 66:7-14.

Furthermore, the rule is unlawfully overbroad on its face. It violates the Board's ruling in *Purple Communications*, because employee use of email for statutorily protected communications on nonworking time must presumptively be permitted by employers who have chosen to give employees access to their email systems. 361 NLRB 126 (2014). There is no limiting language in the policy that allows employees to email coworkers without copying Branch on the email. As such, the policy is reasonably read as overbroad because it limits employees' Section 7 rights when using Respondent's email system. The text messages between Davis and Minor are about the Continued Communication Policy are proof of the chilling effect of the unlawfully overbroad rule. GC-10.5-11.

Neither of the Respondent's emails dated August 11, 2015, nor the email alleged to be unlawful at paragraph 8(b) of the Amended CNOH from December 18, 2015, that reiterated the same rule, contain any limiting language to clarify the overbroad policy; therefore it should reasonably be viewed as unlawfully inhibiting Section 7 activities. Therefore both the policy as stated on June 18, 2015, and restated on December 18, 2015, are unlawful under Section 8(a)(1) of the Act, because they are overbroad under the first

prong, and implemented in response to protected concerted activity under the third prong of the *Lutheran Heritage Village-Livonia* analysis. *Supra.*

F. Amended CNOH Paragraph 9 – Respondent terminated Nick Davis and placed Zipporah Legarde (Minor) on Administrative Leave and then Terminated Her because They Engaged in Protected Concerted Activities and Violated Unlawful and Coercive Work Rules.

i. Terminations In Retaliation For Protected Concerted Activities

Under *Wright Line*, the General Counsel has the initial burden to show that animus toward protected activity was a substantial or motivating factor in the unlawful conduct. 251 NLRB 1083, 1089 (1980). The burden then shifts to the Respondent to prove its affirmative defense that it would have taken the same action even in the absence of protected activity. *Id.*; *Manno Electric, Inc.*, 321 NLRB 278, 280 fn. 12 (1996). The employer cannot simply present a legitimate reason for its actions but must persuade by a preponderance of the evidence that the same action would have taken place even in the absence of the protected conduct. *T&J Trucking Co.*, 316 NLRB 771 (1995).

COO Branch's overt hostility toward Davis and Minor's discussions about working conditions, and Respondent's unlawful documentation regarding the terminations establishes General Counsel's burden under the first step of the *Wright Line* analysis. *Supra.* To establish a prima facie case, General Counsel must show the existence of protected activity, Respondent's knowledge of that activity, evidence of animus, and the link or nexus between the protected activity and the adverse employment action. *Wal-Mart Stores, Inc.*, 341 NLRB 796, 805 (2004) (citing *Farmer Bros. Co.*, 303 NLRB 638, 649 (1991)).

As discussed above, Davis and Minor were engaged in numerous instances of protected activities. Pursuant to Section 7 of the Act, employees have the right to engage

in concerted activities for their mutual aid and protection. Employees need not present a specific demand upon their employer to be protected under Section 7 and 8(a)(1) of the Act. *N.L.R. B. v. Washington Aluminum Co*., 370 U.S. 9, 14 (1962). "The language of Section 7 is broad enough to protect concerted activities whether they take place before, after, or at the same time such a demand is made." *Id.* Furthermore, an employee's subjective motive for taking action is not relevant to whether that action was concerted. *Fresh & Easy Neighborhood Mkt., Inc.*, 361 NLRB No. 12 (Aug. 11, 2014). "Employees may act in a concerted fashion for a variety of reasons-- some altruistic, some selfish--but the standard under the Act is an objective one." *Circle K Corp.*, 305 NLRB 932, 933 (1991).

Davis and Minor were just becoming familiar with Respondent's operations during their nascent employment as of June 18, 2015. Their text messages were meant to be private communication between employees regarding working conditions. GC-10.5-11. Several aspects of the text messages are objectively protected concerted activity engaged in by the two employees. They referenced an argument between fellow employee McGrew, and a supervisor, Sumler. Tr. 167:21-168:2, 274:19-21; GC-10.5; *see also* GC-24, at "Incident 5." They text messaged each other criticizing Branch's management methods, the haughty tone by which he addresses employees, his failures as a supervisor, and his possible dislike for fellow employee Frazier. GC-10.5-11. Concern about a fellow employees and how they are affected by management is clearly protected concerted activity. *See Salon/Spa at Boro, Inc.*, 356 NLRB No. 69 (2010) (concluding that employees who voiced complaints about how management treated employees were engaged in protected concerted activity); *Senior Citizens Coordinating Council*, 330

NLRB 1100, 1104 (2000) (concerted letter addressing concerns about a supervisors' inadequate supervisory skills is protected); *Noland Co.*, 269 NLRB 1082, 1088 (1984) (concluding that the Act protects employee complaints about how supervisors treat employees). Davis and Minor also discussed their belief that email communication was not appropriate for discussing working conditions because management monitored their email accounts and had introduced the new Continued Communication Policy. GC-6;GC-10.7-8. Discussion about the impact of a work rule on employees' ability to discuss working conditions is also protected concerted activity.

Branch had knowledge of the content of the texts messages after his interrogation of Minor. It was obvious from the substance of the texts that Davis and Minor were discussing their working conditions and the working conditions of their coworkers under his supervision.

The record contains abundant admissions and evidence of unlawful motives and actions by Respondent in response to the protected activities of Davis and Minor. On June 18, 2015, Branch told employees they could not discuss things amongst themselves behind a closed door without prior approval by management. GC-4. On the same day, Branch implemented a policy that all emails sent by employees at the Bienville Office must be copied to him. GC-6. Later on June 18, 2015, just before putting Minor on administrative leave, Branch interrogated Minor because he believed Minor and Davis had been criticizing his performance as a supervisor. Tr. 177:4-5. Branch repeatedly said that he found Minor untrustworthy in a manner indicating that she was under threat of discipline because she would not reveal her protected text conversation with Davis. Tr. 177-178. Branch then interrogated Minor about associating with other employees outside

of work, and stated that her familiarity with other employees was not acceptable. 178-179. Branch and Sumler then accused Minor of discussing salaries or other unspecified private, confidential, or proprietary information. Tr. 179:16-180:5. Branch even said that Minor did not have a right to discuss her own salary with other employees. 180:14-17.

Meanwhile Harris threatened Davis with termination if it was revealed that he was involved in the "mess," which referred to the protected concerted messages involving Minor about working conditions. Tr. 273:10-14. Just before he terminated Davis, Harris threatened to sue employees if they spoke badly about him or Respondent. Tr. 275:10-16.

The termination documentation speaks for itself, and contains many statements of animus in the form of the independent Section 8(a)(1) statements meant to discourage employees from discussing working conditions, discussing salaries, discussing mistreatment of employees by a supervisor, discussing Branch's professional abilities, and discussing promotion practices of Respondent. Finally Respondent characterizes Davis and Minor as being engaged in inappropriate familiarity through their text messages involving their concerns about the working conditions. GC-9; GC-10.

The record overwhelmingly establishes that Davis and Minor were engaged in protected concerted activity, and that Branch knew about the protected content of the text messages, and additionally believed Minor had engaged in other protected concerted activity by discussing salaries. The animus evidence is inextricably linked and directly motivated Respondent's decision to put Minor on administrative leave on June 18, 2015, and then to terminate Minor and Davis on June 22, 2015.

Not surprisingly, Respondent failed to meet its burden to demonstrate that it would have placed Minor on leave, and then terminated her in absence of her protected

activity. As discussed above in the credibility resolutions, Minor was not, as claimed, witnessed sleeping "by multiple employees." She simply took a break at her desk. Tr. 171-172; GC-9.1. Branch admitted indirectly in his email that Minor had not been informed that she should answer phones while on break prior to her taking the break on June 18, 2015. GC-5. Rowan admitted that employees are free to do whatever they want on break. Tr. 116:23-117:5, 117:20-23, 118:8-10. Respondent used the disagreement between Sumler and Minor about answering phones as pretext to claim that Minor was failing to perform one of her assigned duties, and asleep at her desk, because Branch wanted Minor fired for her protected activities. Respondent's claim that Minor was repeatedly warned by Branch to stop participating in loud non-work related conversations was not supported by the documentary evidence or credible testimony. Respondent did not issue to Minor any corrective discipline nor was any putative verbal warning noted in Minor's file. As the Chief Operating Officer and former Compliance Officer, Branch fully understood the disciplinary process. Moreover, it was part of Branch's practice to document unsatisfactory performance as he had done for a different employee who did not follow directions. GC-22. In conclusion, Minor was not fired for sleeping or disruptively talking about non-work related topics, she was fired for communicating with Davis regarding their working conditions and because Branch believed she had discussed salaries and wages with other employees.

Respondent failed to meet its burden to demonstrate that it would have terminated Davis in absence of his protected activity. Davis indicated truthfully that he had not been convicted of any felony when he applied for employment with Respondent. When asked to provide more information on his pending charge, he did so through his attorney. GC-

18. He also mentioned to Harris that someone had been arrested with marijuana at an apartment that was in Davis' name. Tr.298:18-299:3. Respondent did not indicate in any way that the letter from Davis' lawyer was insufficient and the pending legal action was not mentioned by Harris at the time Davis was terminated. In conclusion, Davis was not terminated for having a pending felony charge; the Respondent regularly employs people with criminal records. Tr. 358:25-359:3. Davis was terminated by Respondent for the protected activity of discussing working conditions via text messages with Minor.

In addition, Davis did not lose the protection of the Act when he stated to Minor that Branch disliked Frazier because she is "pretty, intelligent, and a woman everything he wants to be." GC-10.9. Under the test laid forth in *Atlantic Steel Co*., the factors considered for determining whether an employee engaged in protected activity loses the protection of the Act by opprobrious conduct are: (1) the place of the discussion; (2) the subject matter of the discussion; (3) the nature of the employee's outburst; and (4) whether the outburst was, in any way, provoked by an employer's unfair labor practice. 245 NLRB 814, 816-817 (1979); *see also Consumers Power Co.*, 282 NLRB 130, 132 (1986) (when "employee is discharged for conduct that is part of the res gestae of protected concerted activities, the relevant question is whether the conduct is so egregious as to take it outside the protection of the Act"). Counsel submits that the *Atlantic Steel Co.* factors are not well suited to a discussion of Davis' choice of language because Davis did not have any outburst directed at Branch. If not for Branch's interrogation of Minor, Branch would not have learned of Davis' comment. Applying the factors, the place of discussion was in a private text discussion between two employees and was revealed in a private conversation between Minor and Branch, with Sumler

present. This weighs in favor of finding that Davis is protected by the Act. *See The Tampa Tribune*, 351 NLRB No. 96, slip op. at 3 (2007) (where employee's profane and derogatory remark about a manager occurred in an office, away from other rank-and-file employees, this factor weighs in favor of protection); *Firch Baking Co.*, 232 NLRB 772 (1977) (where employee's comments occurred in a private office meeting, and not on the plant floor where they could have negatively affected supervisors' status with other employees, employee did not forfeit the Act's protection). The second factor also weighs in favor of protection because Davis was asserting that he thought Branch was mistreating a fellow employee, Frazier, based on, in part, personal jealousy and professional rivalry. The third factor weighs in favor of protection because there was no actual outburst directed at Branch, and Davis' statement falls short of being outrageous and does not suggest that Davis' concern about Branch was *because of* Branch's sexual orientation. To the contrary, Davis' concern about Branch is objectively based on Branch's management style, perceived deficiencies, perceived influence on Harris, and because Davis believed Branch mistreated Frazier. Finally the fourth factor weighs toward protection because the comment occurred in part as a response to Respondent's unlawful Continued Communication Policy. Davis made the comment within the protected concerted texts just after Davis and Minor exchanged remarks about management reading employees' emails and about the promulgation of the Continuing Communication Policy announced by Branch that very morning on June 18, 2015. Therefore Davis did not lose the protection of the Act due to any egregious conduct toward Branch.

ii. Terminations For Violations of Overbroad Rules

Discipline is unlawful when an employee violates an overbroad rule by "(1) engaging in protected conduct, or (2) engaging in conduct that otherwise implicates the concerns underlying Section 7 of the Act." *The Continental Group, Inc.*, 357 NLRB 409, 412 (2011). In this case, Respondent terminated Davis and Minor for the content of their text messages which are protected. Respondent cited all four aspects of the Handbook rule alleged to be unlawful at paragraph 7(b) of the Amended CNOH, "Professional Ethics" Rules 8, 11, 13, and 14 in its documentation of Davis and Minor's terminations. GC-2, at 3-4; GC-9; GC-10. The Respondent cited the "inappropriate familiarity among staff members," language of Rule 8 in explicit reference to Davis and Minor's "relationship" which was evidenced by the text messages. GC-9.1; GC-10.3. Respondent cited the rule alleged to be unlawful at paragraph 7(d) of the Amended CNOH, "The Employee has engaged in conduct, on or off duty that is of such a nature it causes discredit to the agency," in its documentation of both Davis and Minor's terminations. GC-2, at 18-19; GC-9; GC-10. Finally, Respondent also cited the rule alleged to be unlawful at paragraph 7(e) of the Amended CNOH, stating the employee "will protect personal and confidential information concerning the organization's system, employees, and youth and families," in its documentation of both Davis and Minor's terminations. GC-3, at 6; GC-9; GC-10. The overbroad rules were applied to chill protected activities and to pretextually serve as a basis for the Respondent's terminations of Davis and Minor.

G. Counsel's Motion to Amend the Amended CNOH to Add Nick Davis as an Unlawfully Terminated Employee is Proper

The Board will permit the litigation of an otherwise untimely complaint allegation if the conduct alleged occurred within 6 months of a timely filed charge and is closely

related to the allegations of the timely charge. *Alternative Energy Applications, Inc.*, 361 NLRB No. 139 (Dec. 16, 2014). The Board's test for determining whether the otherwise untimely allegation is closely related to the timely charge is set forth in *Redd-I, Inc.*, 290 NLRB 1115 (1988). Under *Redd-I*, the Board considers (1) whether the otherwise untimely allegation involves the same legal theory as a timely filed allegation; (2) whether the otherwise untimely allegation arises from the same factual situation or sequence of events or involves similar conduct during the same time period, and with a similar object; and (3) whether a respondent would raise the same or similar defenses to both allegations. Id. at 1118; *see also Carey Salt Co.*, 360 NLRB No. 38, slip op. at 6 (2014).

The amendment adding Davis to the Amended CNOH meets the Board's criteria. First, the termination of Davis involves the same theory of unfair labor practice, termination in retaliation for and in order to discourage protected concerted activities, as General Counsel applies to the discharge of Minor as alleged in her charge in Case No. 15-CA-155131. The termination of Davis arises out of the same factual situation as the termination of Minor, because his termination is entirely based on his engaging in protected concerted activity with Minor of discussing their working conditions in the form of the text messages. Significantly Davis and Minor were terminated on the same day, and with significantly similar supporting documentation, and with citations to the same unlawful work rules. Finally, Respondent raises substantially similar *Wright* Line defenses through the termination documentation. GC-9; GC-10. The addition of the allegations that Davis was discharged pursuant to unlawful rules and discharged due to

his protected concerted activities meets the *Redd-I* test, and the amendment is proper. *Supra.*

III. CONCLUSION

The evidence at hearing demonstrated that Respondent maintained overbroad work rules in violation of Section 8(a)(1) of the Act, promulgated other coercive policies in order to discourage protected activities, and Respondent engaged in numerous other Section 8(a)(1) coercive statements and rules directed toward Davis and Minor in writing and by word of mouth. Each of Respondent's unlawful statements and rules tended to give the unequivocal message that Respondent's employees should not discuss their terms of employment and working conditions privately amongst themselves. Respondent retaliated by fabricating reasons to terminate Davis and Minor because COO Branch knew and believed they engaged in protected concerted activities, and by unlawfully applying coercive work rules to justify the terminations. Counsel for the General Counsel respectfully requests a finding that Respondent has violated Section 8(a)(1) of the Act and that an award be made for all remedies as plead.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 7, 2016, I electronically filed a copy of the foregoing Counsel for General Counsel's Brief to the Administrative Law Judge with the National Labor Relations Board Division of Judges and forwarded a copy by electronic mail to the following:

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